STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and the Circuit Court for the County of Oakland)

BRIAN J. PERRY,

Plaintiff-Appellee,

vs.

GOLLING CHRYSLER PLYMOUTH JEEP, INC., ~~a Michigan Corporation~~,

Defendant-Appellant.

Supreme Court No: _____
COA No: 254121 Opn 12/11/05
L.C. No: 03-053489-NI

Oakland
E. Sosnick

OK

129943
APL
12/13
28614

SULLIVAN, WARD, ASHER & PATTON, P.C.

NOTICE OF HEARING

NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL

DEFENDANT-APPELLANT GOLLING CHRYSLER PLYMOUTH JEEP, INC.'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

RONALD S. LEDERMAN (P38199)
CHARLES E. RANDAU (P19214)
Attorneys for Defendant-Appellant
1000 Maccabees Center
25800 Northwestern Highway
P. O. Box 222
Southfield, MI 48037-0222
(248) 746-0700

STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and the Circuit Court for the County of Oakland)

BRIAN J. PERRY,

Plaintiff-Appellee,

vs.

GOLLING CHRYSLER PLYMOUTH JEEP, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court No: _____
COA No: 254121
L.C. No: 03-053489-NI

_____/

DEFENDANT-APPELLANT GOLLING CHRYSLER PLYMOUTH JEEP, INC.'S APPLICATION FOR LEAVE TO APPEAL

RONALD S. LEDERMAN (P38199)
CHARLES E. RANDAU (P19214)
Attorneys for Defendant-Appellant
1000 Maccabees Center
25800 Northwestern Highway
P. O. Box 222
Southfield, MI 48037-0222
(248) 746-0700

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES:

STATUTES:

RULES:

OTHER AUTHORITIES:

STATEMENT OF ORDER APPEALED FROM

This is an action against Defendant Golling Chrysler Plymouth Jeep, Inc. ("Golling Chrysler"), a motor vehicle dealership, for derivative liability for the negligence of one of its vehicle purchasers, former Defendant Ksenia Nichols. It is alleged that Ms. Nichols negligently drove her motor vehicle into Plaintiff's parked vehicle on October 20, 2000, immediately after she had purchased the vehicle from Chrysler Golling. As stated, Golling's alleged liability is derivative in nature, under Michigan's Motor Vehicle Owner Liability Statute, MCL 257.401.

Currently, Defendant Golling seeks either leave to appeal or peremptory reversal from a written opinion of the Michigan Court of Appeals dated October 11, 2005. This Court of Appeals' Opinion reversed the trial court's Order that had granted summary disposition in favor of Defendant and reinstated the action against Defendant. (See: Michigan Court of Appeals' Opinion, 10/11/05, attached hereto as EXHIBIT I).

The primary issue erroneously addressed by the Court of Appeals and which must be readdressed by the Michigan Supreme Court is whether Golling Chrysler and Ms. Nichols "executed" the application for title so as to effectuate transfer of ownership of the vehicle to the purchaser under MCL 257.233 prior to the accident. **Reversing the trial court, the Court of Appeals held that "execution" of the Application for Title was not complete and vehicle ownership did not transfer until the application was both signed and mailed to the Secretary of State. (Id, p 3).** The Court of Appeals further held that while it was undisputed that the parties signed the application on October 19, 2000 (prior to the accident), the trial court record did not indicate "when Defendant (Golling) sent the necessary forms to the Secretary of State and, therefore, executed the application for title" (Id).

Secondly, the Court of Appeals held, erroneously, that a release signed by Plaintiff as to Ms. Nichols did not serve to release Defendant Golling because even though Golling's liability was under the Owner's Liability Act, it was not derivative in nature. (Id, p 4).

Both of these legal issues in dispute in this action are significant to the jurisprudence of this state and involve standards which are not yet clearly set forth in controlling precedent. For example, the Court of Appeals below relied upon *dicta* set forth in Goins v Greenfield Jeep Eagle, 449 Mich 1; 534 NW2d 467 (1995), which had unnecessarily stated that the Application for Title in that action was executed when the Defendant sent the necessary forms to the Secretary of State. 449 Mich at 14. For the reasons set forth, *infra*, this statement of *dicta* in Goins was erroneous and must be overruled to the extent that it is now being relied upon as controlling authority by lower courts to conclude that "execution" of the Application for Title requires both "signing" of the document by the parties and "mailing" to the Secretary of State – contrary to the commonly understood definition of the term.

The second significant issue raised in this appeal is whether the common law principle that the release of an agent for tortous conduct operates to bar recovery against the principal on a theory of vicarious liability extends in favor of a defendant sued for derivative liability under the Owners Liability Act for the negligence of the vehicle's operator in whose favor a valid release has been signed. The Court of Appeals here ignored controlling authority such as Geib v Slater, 320 Mich 316; 31 NW2d 65 (1948), an additional reason requiring Michigan Supreme Court review.

STATEMENT OF ISSUES PRESENTED

I. DID TITLE AND OWNERSHIP OF THE SUBJECT MOTOR VEHICLE TRANSFER TO KSENIA NICHOLS WHEN THE PARTIES TO THE SALES CONTRACT SIGNED THE APPLICATION FOR TITLE?

Defendant-Appellant answers "Yes."

The Michigan Court of Appeals said "No."

The Trial Court answered "Yes."

Plaintiff-Appellee answers "No."

II. DOES THE RELEASE OF THE TORTFEASOR DRIVER OF AN AUTOMOBILE OPERATE TO RELEASE THE OWNER OF THE AUTOMOBILE OF ITS DERIVATIVE LIABILITY UNDER MICHIGAN'S OWNERS LIABILITY ACT, MCL § 257.240?

Defendant-Appellant answers "Yes."

Plaintiff-Appellee answers "No."

The Trial Court and Court of Appeals answer "No."

STATEMENT OF FACTS

The instant case arises out of a motor vehicle accident that occurred on October 20, 2000. Plaintiff alleges that Defendant Ksenia Nichols ("Nichols") negligently drove her motor vehicle into Plaintiff's parked vehicle, causing him injury. Plaintiff argues that Defendant-Appellant Golling Chrysler, Plymouth, Jeep, Inc. ("Golling") was the owner of the motor vehicle and is thus liable under Michigan's ownership statute notwithstanding that (1) Nichols had purchased and taken possession of the vehicle, and (2) Golling and Nichols had executed the assignment of title before the accident occurred. (*See* Plaintiff's Complaint, ¶¶ 12-15, attached as **Exhibit A.**)

Nichols began to negotiate the purchase of the Neon from Golling on October 19, 2000. Significantly, Nichols and Golling completed the Application For Michigan Title Statement of Vehicle Sale on October 19, 2000. (Attached as **Exhibit B**[1]). Included in that document is Golling's Odometer Disclosure Statement (*See* **Exhibit B**).

Much of the remaining vehicle sales documents were also completed on October 19, 2000.

For instance, a "DEAL RECAP" evidences that Nichols purchased a "2000 Plymouth Neon" on October 19, 2000 (**Exhibit C**). On this same date, Nichols was provided a 15-day temporary registration, which was also to serve as her temporary license plate. (*See* **Exhibit C.**)

A Retail Installment Contract was also completed. (**Exhibit D**). According to the contract, Nichols was to make a $4,000.00 down payment on a 2000 Dodge Neon. (*See*,

[1] As will be discussed, after a sale is complete, ownership/title is deemed to have been transferred on the date this application was "executed." MCL 257.233(9).

Exhibit D.) The contract is dated 10/19/00 and lists as "Buyer": "Ksenia Nichols". (*See* **Exhibit D**.)

The next day, October 20, 2000, Americredit approved Nichols' application for a loan to purchase the Neon. Accordingly, Nichols signed additional paperwork including "Notices to the Buyer" dated 10/20/00. (**Exhibit E**). Included in this paperwork is a signed Agreement to Provide Insurance on the Neon, dated 10/20/00, and Proof of Insurance, effective October 20, 2000. A receipt showing that Nichols paid Golling $4,000.00 shows that Ms. Nichols took possesion of the vehicle on 10/20/00. (*See*, **Exhibit C**). Finally, Nichols signed the obligatory Michigan Department of State's Registration/Title Eligibility Declaration on October 20, 2000. (*See*, **Exhibit E**). The only documents completed on October 23, 2000 were an apparent Ad Hoc Waiver of Service Contract and Odometer Statement. (**Exhibit F**).

The motor vehicle accident between Plaintiff and Ms. Nichols occurred on October 20, 2000, after all the sales documents and the Application for Title were completed and Nichols had taken exclusive possession of the vehicle at the time of the accident.

Plaintiff initiated this action in Oakland County Circuit, against Golling Chrysler (Complaint, attached hereto as EXHIBIT A). Golling's alleged liability was derivative in nature, as owner of the vehicle (Id, ¶ 13-14). The Complaint was devoid of any allegations of active negligence against Golling. Previously, Plaintiff settled his claim against Ms. Nichols, and executed a release of liability. (*See* **Exhibit G**). Golling was not named as a released party.

Golling then filed its Motion For Summary Disposition of Plaintiff's claims based on two grounds: (1) it could not be held liable under the owner liability statute because the accident occurred after an effective transfer of title, and (2) the release of Ms. Nichols operated

to release Golling of its derivative liability. The trial court granted Defendant's motion based on the effective transfer of title, but rejected Defendant's "release" argument. (*See* Opinion and Order, February 9, 2004, **Exhibit H**).

Plaintiff filed a Claim of Appeal with the Michigan Court of Appeals from the trial court's summary disposition order.

The Court of Appeals issued its written opinion without oral argument on October 11, 2005. The Court of Appeals reversed the summary disposition order due to the existence of a material factual dispute regarding the date of the "execution of the application for title." (EXHIBIT I, p 3). Following *dicta* in Goins v Greenfield Jeep Eagle, supra, the Court of Appeals held that "execution" of the application for title within the meaning of MCL 257.233(9), infra, did not occur until the dealer "sent the necessary forms to the Secretary of State." Id.

Secondly, the Court of Appeals affirmed the denial of Defendant's Motion for Summary Disposition on the "release" issue. The Court of Appeals held that Defendant's liability was not "derivative" in nature and thus Defendant was not protected by the release executed in favor of Ms. Nichols (id, pp 3-4).

ARGUMENT I

DEFENDANT GOLLING CANNOT BE HELD LIABLE UNDER THE OWNERSHIP LIABILITY STATUTE WHERE OWNERSHIP OF THE SUBJECT MOTION VEHICLE EFFECTIVELY TRANSFERRED TO KSENIA NICHOLS UPON THE EXECUTION OF THE APPLICATION OF TITLE BY THE PARTIES' SIGNATURES.

A. Standard of Review.

Defendant moved for summary disposition under MCR 2.116(C)(7) (release) and (10). Under either rule, the standard of review is very similar. *See* Maiden v Rozwood, 461 Mich 109, 119-120; 597 NW2d 817 (1999). A party may support its MCR 2.116(C)(7) motion with affidavits, depositions, admissions, or other documentary evidence, but is not required to do so. Maiden, supra at 119; MCR 2.116(G)(2). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and must be supported by evidence. MCR 2.116(G)(3); Maiden, supra at 120.

The appellate Court reviews a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) de novo to determine whether the moving party was entitled to judgment as a matter of law. Rinas v Mercer, 259 Mich App 63, 67; 672 NW2d 542 (2003); Spiek v Dep't of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998).

B. Controlling Standards of Statutory Construction.

Statutory language should be construed reasonably, keeping in mind the purpose of the act. People v Spann, 250 Mich App 527, 530; 655 NW2d 251 (2002). If reasonable minds can differ as to the meaning of a statute, judicial construction is appropriate. People v Warren, 462 Mich 415, 427; 615 NW2d 691 (2000).

The Court must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction which best accomplishes the statute's purpose. People v Adair, 452 Mich 473, 479-480; 550 NW2d 505 (1996); Marquis v Hartford Accident & Indemnity, 444 Mich 638, 644; 513 NW2d 799 (1994); Oberlies v Searchmont Resort, Inc, 246 Mich App 424, 430; 633 NW2d 408 (2001); People v Lawrence, 246 Mich App 260, 265; 632 NW2d 156 (2001). In doing so, the court may consider a variety of factors and apply principles of statutory construction, but should also always use common sense. Marquis, supra; Rancour v Detroit Edison Co, 150 Mich App 276, 285; 388 NW2d 336 (1986).

Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, considering the context in which the words are used. MCL 8.3a; Robertson v DaimlerChrysler Corp, 465 Mich 732, 748; 641 NW2d 567 (2002); Sun Valley Foods Co v Ward, 460 Mich 230, 237; 596 NW2d 119 (2001); People v Lee, 447 Mich 552, 557-558; 526 NW2d 882 (1994). Words and phrases should be read in context. People v Vasquez, 465 Mich 83, 89; 631 NW2d 711 (2001). A court may consult dictionary definitions of a term not expressly defined in a statute. People v Gould, 225 Mich App 79, 84; 570 NW2d 140 (1997).

C. Controlling Standards of Law.

The only basis for liability alleged against Defendant Golling is the owner liability statute, MCL § 257.240, *et seq*. The pertinent sections of the statute provides for the liability of a vehicle owner only under the following circumstances:

> **257.240. Liability for use or ownership of vehicle after transfer of endorsed certificate of title.**
>
> The owner of a motor vehicle who has made a bona fide sale by transfer of his or her title or interest and who has delivered

> possession of the vehicle and the certificate of title thereto properly endorsed to the purchaser or transferee shall not be liable for any damages or a violation of law thereafter resulting from the use or ownership of the vehicle by another.
>
> **257.401. Civil Actions; Liability of Owner, Lessor**
>
> Sec. 401.(1)...the owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of the state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his/her express or implied consent or knowledge.

Under § 401 of the owner's liability statute, liability may be imposed on the owner of a motor vehicle for an accident involving negligent operation of a vehicle by anyone operating the vehicle with the owner's express or implied consent. MCL § 257.401; Latham v National Car Rental Systems, Inc, 239 Mich App 330, 334; 608 NW2d 66 (2000). The purpose of this statute is to place the risk of damage or injury on the person who has ultimate control of the motor vehicle as well as the person in immediate control. DeHart v Lunghammer Chevrolet, Inc, 239 Mich App 181, 185; 607 NW2d 417 (2000).

However, ownership of a vehicle is not "cast in stone," Goins v Greenfield Jeep Eagle, 449 Mich 1, 5 (1995) and may be transferred by complying with the following steps provided in MCL 257.233:

> (8) The owner shall indorse on the back of the certificate of title an assignment of the title with warranty of title in the form printed on the certificate with a statement of all security interests in the vehicle or in accessories on the vehicle and deliver or cause the certificate to be mailed or delivered to the purchaser or transferee at the time of the delivery to the purchaser or transferee of the vehicle. The certificate shall show the payment or satisfaction of any security interest as shown on the original title.
>
> (9) Upon the delivery of a motor vehicle and the transfer, sale, or assignment of the title or interest in a motor vehicle by a person, including a dealer, the effective date of the transfer of title or interest in

the vehicle shall be the date of execution of either the application for title or the certificate of title.

MCL 257.233(8), (9).

After one validly transfers title, the transferor is no longer considered an owner of the vehicle and is relieved of any liability associated with its use. MCL § 257.240. Moreover, the Michigan Supreme Court will recognize the existence of a transfer of title in cases in which **substantial compliance** with the Motor Vehicle Code's requirements was achieved. Schomberg v Bayly, 259 Mich 135, 139; 242 NW 866 (1932). (Filing certificate of title after statutorily required period did not invalidate ownership transfer); Zechlin v Bridges Motors Sales, 190 Mich App 339, 342; 475 NW2d 60 (1991) (Improper vehicle registration is not fatal to transfer of ownership); Long v Thunder Bay Mfg Corp, 86 Mich App 69, 70; 272 NW2d 337 (1978) (Failure to remove license plates did not prevent ownership transfer where the defendant delivered the vehicle with the certificate of title to the purchaser). Goins, supra. (Failure of dealer to verify purchaser's insurance pursuant to Secretary of State manual.)

Thus, the only issue is whether Defendant Golling "substantially complied" with the Motor Vehicle Code's requirements to transfer title to Ms. Nichols prior to the accident. *See e.g.*, Poch v Anderson, 229 Mich App 40, 52; 580 NW2d 456 (1998).

1. The Statement In *Goins* That "Execution" Of The Application For Title Occurs Upon Mailing Is *Dicta* And Does Not Constitute Controlling Precedent.

Statements of *dicta*, do not constitute a "rule of law" and are not binding under principles of *stare decisis*. Carr v City of Lansing, 259 Mich App 376, 387-388; 674 NW2d 168 (2003), Colucci v McMillin, 256 Mich App 88, 97, fn 6; 662 NW2d 87 (2003). Dicta is a judicial comment made in the course of delivering a judicial opinion which is unnecessary to

the decision in the case and not otherwise germane to the controversy. Carr, supra. Statements of the Supreme Court in dicta have no precedential value. See, e.g., People v Sobczak-Obetts, 253 Mich App 97, 103-104, fn 4; 654 NW2d 337 (2002).

The Court of Appeals below felt compelled to follow the statement in Goins that "execution" of the application for title within the meaning of MCL 257.233(9), supra, does not occur until the application is mailed to the Secretary of State (EXHIBIT I, p 3). However, that statement in Goins was not necessary to the decision in that case and was not germaine to the controversy. Carr, supra. The statement in Goins did not otherwise constitute binding precedent which compelled the Court of Appeals in this action to follow it.

In Goins, the plaintiff brought an action against the defendant dealership for the negligent operation of a vehicle that the dealership had sold. The plaintiff asserted that the dealership was liable as the owner of the car and that the dealer had never validly transferred title of the vehicle because it failed to verify that the purchaser had insurance at the time of the transaction. The Michigan Supreme Court held that the dealership had transferred ownership of the vehicle at the time of the accident because, complying with MCL 257.233(9), it had completed the proper application for a certificate of title and submitted it to the Secretary of State prior to the accident. Goins concluded that the dealership was not required to verify the purchaser's insurance as a precondition to the valid transfer of title to the vehicle. 449 Mich at 14.

The Plaintiff in Goins did not contest the date of the "execution" of the Application of Title and such date was not otherwise at issue in that action. Rather, the Plaintiff had argued that the dealer had violated a Secretary of State-issued manual that required dealerships to

verify proof of insurance prior to submitting the Application for Title. Id, at p 8. The "rule of law" in Goins was that the "manual" did not constitute a properly promulgated agency "rule" that possessed the force and effect of law. Id at 8-9. Thus, the defendant's "failure to follow this nonpromulgated requirement within the informational manual did not prevent the transfer of ownerhip" in Goins. Id, at 10.

The Supreme Court in Goins was not required to determine that "execution" of the application for title required mailing of the document to the Secretary of State in order to resolve that action. Id, at 14. That conclusion was a gratuitous statement regarding a point of law that was not being litigated in that action. Goins moreover interpreted the word "execution" contrary to its statutory context and ordinarily understood meaning.

2. Execution Of The Application For Title Does Not Require Its Mailing To The Secretary Of State.

The Michigan Legislature did not define the word "execution" within MCL 257.233 or otherwise within the Motor Vehicle Code. However, *Black's Law Dictionary* (Bryan Garner Ed., 7th Ed West 1999) defines the term "executed" as "(of a document) that has been signed." Id at 589. In a distinguishable context, an "executed contract" is defined as a "contract that has been fully performed by both parties" or as a "signed contract." Id, p 321. In Stern v Board of Regents, 846 A2d 996 (MD App 2004), the Maryland Court of Appeals observed that *Black's Law Dictionary* supplemented its definition of the term "executed" with the following:

> 'The term "executed" is a slippery word. Its use is to be avoided except when accompanied by explanation.... A contract is frequently said to be executed when the document has been signed, or has been signed, sealed, and delivered. Further, by executed contract is frequently meant one that has been fully performed by both parties.' William R. Anson, *Principles of the Law of Contract 26 n.* (Arthur L. Corbin ed., 3d Am. Ed. 1919).

846 A2d at 1013.

Indeed, as commonly understood, a document or application is not "executed" upon mailing. Rather, the document is "executed" upon "signing." Likewise, in the context of the Motor Vehicle Code, the application for title is executed upon "signing." MCL 257.217(4), supra, contemplates as such, stating that a motor vehicle purchaser "shall sign the application... and other necessary papers to enable the dealer or person to secure the title... from the Secretary of State." MCL 257.217(4). The operative provision of MCL 257.233(9) (e.g., the effective date of the transfer of title shall be "the date of execution of either the application for title or the assignment of the certificate of title") must be construed in context of the dicates of MCL 257.217(4) and its own contemplation that "execution" requires the signature of the buyer. Lindsey v Harper Hosp, 455 Mich 56, 65; 564 NW2d 861 (1997) [construction of statutes in *pari materia* together as one law].

The Motor Vehicle Code also differentiates between "execution" of a document such as the application for title and the process itself of "applying" for title. MCL 257.217(4) uses the word "apply" in the context of the requirements of submitting the appropriate forms to the Secretary of State. Indeed, paragraph 1 of section 217 states that the new owner of a vehicle that is subject to registration under the Motor Vehicle Code "shall apply to the Secretary of State, upon an appropriate form furnished by the Secretary of State, for the registration of the vehicle and issuance of a Certificate of Title for the vehicle." MCL 257.217(1). That same paragraph also requires the application for title to "bear the signature or verification and certification of the owner." Id. Likewise, a dealer selling or otherwise exchanging a vehicle required to be titled is to "apply to the Secretary of State for a new title" within 15 days after

delivery of the vehicle to the purchaser. MCL 257.217(4). Mailing may be part of "applying" for title, but it is not part of the "execution" of the Application.

Had the legislature intended to delay transfer of ownership liability until the dealer "applied" for the title with the Secretary of State, it would have utilized consistent language. Instead, the legislature defined the time of transfer as occurring not upon "mailing" or "applying," but upon the "execution" of the Application. The term "execution" as set forth in MCL 257.233(9) is therefore consistent with the "signature" requirements of both that statute and MCL 257.217(1). "Signing" or "executing" the application for title is just one part of the process of "applying" for the title, just as "mailing" the application is a separate part of that same process. "Execution" of the document and "mailing" of the same document are two separate acts which were erroneously equated as one act by both the Goins Court in its *dicta* and the Court of Appeals in this action.

The purposes of the Owner Liability Act are also best served by defining the word "execution" with its common meaning of "signing" a document. As earlier stated, the purpose of the statute is to place the risk of damage or injury on the person who has both ultimate and immediate control of the motor vehicle. DeHart, supra, 239 Mich App at 185. That purpose is best served by exculpating from liability the motor vehicle dealer which has sold the vehicle, transferred the vehicle's possession to the purchaser and has executed the documentation required to effectuate the legal transfer of ownership. Simply put, at the time of the accident, Golling Chrysler had neither ultimate nor immediate control of the vehicle. Such control had been transferred exclusively to the purchaser, Ms. Nichols.

D. Title Transferred to Ksenia Nichols Before the Accident Occurred.

Applying the statutory requirements to the instant case, it is clear that the title transferred to Ksenia Nichols on October 19, 2000. **Pursuant to MCL 257.233, "upon the delivery ... and sale ... the effective date of transfer of title or interest in the vehicle shall be the date of execution of ... the application for title...."** In this case, the sale of the Neon was completed when Ksenia Nichols made a down payment of $4,000.00[2] and after she was approved for a loan through Americredit on October 20, 2000[3]. The parties executed the Application for Michigan Title-Statement of Vehicle Sale on October 19, 2000, which according to MCL 257.233(9), makes the effective date of transfer of title October 19, 2000. (*See* **Exhibit B**).

Because the accident in this case did not occur until October 20, 2000, at which time Golling was not the owner, it follows, logically, that Golling cannot be held liable under the ownership statute. Although the accident occurred on the same day that Ms. Nichols took possession of the vehicle, Plaintiff's argument that Golling did not substantially comply with the statutory requirements is disingenuous. Summary disposition, therefore, was appropriate in this case. MCR 2.116(C)(10). The trial court's decision should be affirmed as a matter of law.

[2] See Exhibit C.
[3] See Exhibit F.

ARGUMENT II

PLAINTIFF'S RELEASE OF KSENIA NICHOLS RELEASED GOLLING OF ITS DERIVATIVE LIABILITY FOR NICHOLS NEGLIGENCE.

A. Controlling Standards of Law.

The instant case is not based on any tortous action by Golling, but rather on derivative, statutory liability. As this Court noted in Geib v Slater, 320 Mich 316, 321; 31 NW2d 65 (1948), "Defendant is guilty of no tortous act; he did not participate in the commission of the tort; and his liability arises only by operation of law."

It is well settled that where liability is strictly derivative or secondary, the release of one tortfeasor releases the other. Theophelis v Lansing General Hospital, 430 Mich 473, 481; 424 NW2d 478 (1988); Rzepka v Michael, 171 Mich App 748, 757; 431 NW2d 441 (1988); Drinkard v Pulte, 48 Mich App 67; 210 NW2d 137 (1973); Willis v Total Health Care, 125 Mich App 612, 617; 337 NW2d 20 (1983)). Vicarious liability is indirect responsibility imposed by operation of law. In modern jurisprudence, vicarious liability is justified as "a rule of policy, a deliberate allocation of a risk." Prosser & Keeton, Torts (5th ed), § 69, p 500. Theophelis v Lansing General Hospital, supra at 482.

In Theophelis, the court elaborated on the policy concerns underlying the extension of the protection of a release to a party alleged to have derivative or secondary liability for the negligence of the tortfeasor executing the release:

> Vicarious liability is based on a relationship between the parties, irrespective of participation, either by act or omission, of the one vicariously liable, under which it has been determined as a matter of policy that one person should be liable for the act of the other. Its true basis is largely one of public or social policy under which it has been determined that, irrespective of fault, a party should be held to respond for the acts of another."
>
> Id. at 482.

The Michigan Supreme Court, in Geib, supra[4], addressed the identical issue now again before this Court and held that a release given to a driver of a car that killed plaintiff's decedent operated as a bar to plaintiff's claim against the vehicle's owner sued for derivative liability under the Owner's Liability Act.

The Geib Court rejected the Plaintiff's contention that the vehicle owner was a "tortfeasor" within the meaning of MCL 600.2925d, which states that a release of a tortfeasor "does not discharge any of the other tortfeasors from liability... unless its terms so provide." Holding § 2925d inapplicable to one being sued for derivative liability, the Geib Court, in a unanimous opinion, reasoned that the "[defendant] is guilty of no tortous act; he did not participate in the commission of the tort; and his liability arises only by operation of law." The Court compared the vicarious liability of the automobile owner "with that of a surety for the honesty of an employee, whose obligation differs from that of his surety." Id. *See also* Theophelis, 430 Mich at 485. Geib also characterized the derivative liability of a vehicle owner as akin to an employer's liability under the doctrine of *respondeat superior*.

In Moore v Palmer, 350 Mich 363, 394; 86 NW2d 585 (1957) the Supreme Court overruled that portion of the opinion in Geib which held that derivative liability under the Michigan owner liability act was based upon the doctrine of *respondeat superior* because the owner's statutory liability was actually broader and was not subject to the defense in that action that the driver temporarily departed from the scope of his employment at the time of the accident. Id at 393-394. Moore concluded that a vehicle owner's liability "under the statute is not limited by the common law tests applicable to the master-servant relationship." Id at 394. However, Moore did not overrule that portion of Geib which stated that a vehicle owner's

[4] Overuled on other grounds, Moore v Palmer, 350 Mich 363 (1957).

statutory liability is nonetheless derivative in nature and thus a release of the driver from liability for tort operates to release the owner as well. See: Drinkard, 48 Mich App at 76-77. That portion of Geib remains in tact, as does its ruling that such a vehicle owner is not a "tortfeasor" within the meaning of MCL 600.2925d.

B. Plaintiff's Release of Ksenia Nichols Operates to Release Golling as Well.

Applying the controlling standards to the instant case, summary disposition of Plaintiff's claims against Golling should have been affirmed based upon the operation of the release

Specifically, both the lower courts erroneously equated the term "respondeat superior" with "vicarious liability." The Court of Appeals further ignored those cases decided after Geib that have expressly stated that the owner's liability statute is based on vicarious liability. *See* Advisory Opinion re Constitutionality of 1972 PA 294, 389 Mich 441, 508; 208 NW2d 469 (1973) ("Vicarious owners liability, *qua owner,* is not derived from common law and is purely statutory in Michigan, governed by the so-called 'owners liability act', MCL § 257.401")[5]; Jones v Cloverdale Equipment Co, 165 Mich App 511, 512; 419 NW2d 11 (1987) (noting that Plaintiff's alleged "vicarious" liability against the defendants for their ownership of the vehicle under MCL 257.401). It is the nature of this "vicarious liability" that serves to extend the protection of the signed release to the claimed vehicle owner.

Plaintiff's continued argument that Moore v Palmer, 350 Mich 363 (1967) overruled Geib v Slater, 320 Mich 316, 321 (1948) with respect to the controlling rule that the release of a tortfeasor driver releases the owner sued under MCL 257.401 is simply incorrect. Moore overruled Geib only to the extent that liability under the statute is not limited by the common

[5] Overruled on other grounds. Williams v Payne, 131 Mich App 403, 407; 346 NW2d 564 (1984).

law tests applicable to the master-servant relationship. Moore, 350 Mich at 394. Therefore, according to Moore, it is no longer a defense to the owner liability statute that a servant or agent to whom the use or operation of the vehicle has been entrusted has temporarily departed from the course of his employment or the scope of his agency. Nor can the owner disclaim liability for willful and wanton misconduct of the operator notwithstanding that, at common law, a wanton violation of the law was held to place a servant outside the scope of his master's service. Moore, 350 Mich at 393-394.

However, nothing in Moore overrules the portion of Geib which stated that release of the negligent driver operated to release the owner. In this case, the release of Ms. Nichols released Defendant Golling as a matter of law. Plaintiff does not plead any *active* negligence against Defendant, only derivative *liability arising by operation of law* under the owner's liability statute. (*See* Plaintiff's Complaint, ¶¶ 12-16, attached as **Exhibit A**). **In sum, Defendant Golling's defense is only as good as Ksenia Nichols, who was released from liability in this matter.**

Finally, Poch v Anderson, 229 Mich App 40, 52; 580 NW2d 456 (1998), cited by the Court of Appeals below (EXHIBIT I, p 4), erroneously held that the owner's liability under the statute is "non derivative." Poch simply misconstrued the import of the Supreme Court precedent discussed above. The statutory liability may not be akin to "*respondeat superior*" liability; nonetheless, it remains as "derivative liability" which arises solely by operation of statutory law. Supreme Court review of this action is necessary to address this additional source of confusion caused by Poch.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Golling-Chrysler Plymouth respectfully requests that this Honorable Court reinstate the trial court's order of February 9, 2004 granting Defendant's Motion for Summary Disposition and vacate the Michigan Court of Appeals' Opinion of October 11, 2005.

Respectfully submitted,

SULLIVAN, WARD,
ASHER & PATTON, P.C.

By: _____

RONALD S. LEDERMAN (P38199)
CHARLES E. RANDAU (P19214)
Attorneys for Defendant-Appellant
1000 Maccabees Center
25800 Northwestern Highway
Southfield, MI 48075-1000
(248) 746-0700

Dated: 11/22/05

W0438665